**UNITED STATES DEPARTMENT OF LABOR**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**

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| OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,<br><br>Plaintiff,<br><br>v.<br><br>GOOGLE, INC.,<br><br>Defendant. | **Case No.: 2017-OFC-00004**<br><br>RECEIVED<br><br>FEB 0 3 2017<br><br>Office of Administrative Law Judges<br>San Francisco, Ca |

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REMOVE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

## I. Introduction

In exchange for millions of dollars in federal business, Google expressly agreed--and is required by law--to allow OFCCP access to its employment records to audit its compliance with equal employment opportunity laws, including non-discriminatory compensation practices. Despite these commitments and obligations, Google has flatly refused to provide a set of compensation data for 2014 and very basic information regarding the limited compensation data it has provided. Lacking any legal basis for withholding such documents and employee contact information, Google now seeks discovery into how the agency is conducting an ongoing investigation. Taking this simple and straightforward matter out of expedited proceedings and allowing Google to deflect the focus to OFCCP is wholly unsupportable and would substantially weaken OFCCP's ability to ensure contractors are abiding by their commitments. This Court should deny Google's Motion.

## II. Background

On January 4, 2017, Plaintiff filed a Complaint in this matter, seeking an Order from this court requiring Defendant to produce three categories of documents: (1) a compensation "snapshot" for September 1, 2014, (2) supporting information for the 2014 and 2015 compensation snapshots, including job and salary history starting salary, starting position, starting "compa-ratio," starting job code, starting job family, starting job level, starting organization, changes to the foregoing and (3) contact information for employees in the two compensation snapshots.

This Complaint came after OFCCP attempted for many months to obtain this information from Defendant voluntarily. Plaintiff first requested compensation data in the Scheduling letter on September 30, 2015, which sought (among other things), employee compensation data.[1] Defendant initially produced no compensation data. Between November 2015 and April 2016, Defendant produced limited compensation data, including a compensation snapshot for September 1, 2015.[2] On June 1, 2016, Plaintiff requested in writing that Defendant produce 2014 compensation snapshot data, job and salary history and employee contact information.[3] On June 14, 2016, Plaintiff and Defendant conferred regarding the scope of Plaintiff's June 1st requests; Plaintiff informed Defendant that Defendant was required to produce the requested records.[4] On June 17, 2016, Defendant refused to comply with Plaintiff's requests for information in writing.[5] Plaintiff responded by informing Defendant that its refusals were a denial of access and contrary to law.[6] Plaintiff and Defendant continued to discuss the matter after June 23, 2016; including by teleconference on July 18, 2016 where Plaintiff again informed Defendant that it was required to produce the requested documents and gave Defendant an

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[1] Declaration of Daniel V. Duff, filed by Defendant on January 24, 2017, ("Duff Decl."), Exhibit A.
[2] Declaration of Agnes Huang ("Huang Decl.") at ¶ 3.
[3] Duff Decl., Exhibit C attachment (at pp. 22-25).
[4] Huang Decl. at ¶ 4.
[5] Duff Decl., Exhibit C.
[6] *Id.* Exhibit D.

opportunity to comply.[7] On September 2, 2016, Defendant reiterated its position that it would not produce a 2014 compensation snapshot, job and salary history or employee contact information.[8]

On September 16, 2016, Plaintiff issued a notice to show cause why proceedings should not be initiated against Defendant for denying access to records.[9] Plaintiff did so in order to give Defendant time to come into compliance with the law and produce records; a notice to show cause with respect to a failure to produce records is not required by the regulations.[10] By correspondence on October 19, 2016, Defendant agreed that Plaintiff and Defendant had reached an impasse regarding Defendant's obligation to turn over compensation data.[11] On November 29, 2016, the parties held a teleconference, including attorneys from the Solicitor's office, about Defendant's continued refusal to provide the requested compensation data. Plaintiff informed Defendant that Defendant was required to produce that information and gave Defendant yet another opportunity to comply with that requirement.[12] On December 6, 2016, Defendant again refused to provide the requested information in writing.[13] On December 20, 2016, Plaintiff informed Defendant of its intention to file the instant action and gave Defendant one more opportunity to produce the contested records. On December 28, 2016, Defendant refused to do so.[14]

The issues in this case are limited and discrete—whether Google has a legal justification for withholding the documents OFCCP's has sought in its compliance review. Nonetheless, on January 24, 2017, concurrent with filing its answer, Defendant filed a motion to take this matter

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[7] Huang Decl. at ¶ 5.
[8] Duff Decl. Exhibit F.
[9] Declaration of Marc Pilotin ("Pilotin Decl.") at ¶ 3, Exhibit A.
[10] 41 C.F.R. 60-1.26(b)(1) ("if a contractor . . . refuses to supply records or other requested information, . . . and if conciliation efforts under this chapter are unsuccessful, OFCCP may immediately refer the matter to the Solicitor, notwithstanding other requirements of this chapter").
[11] Pilotin Decl. at ¶ 4, Exhibit B.
[12] *Id.* at ¶ 5,
[13] *Id.* at ¶ 6, Exhibit C.
[14] *Id.* at ¶ 7.

out of expedited proceedings so it can take discovery beyond what is permitted by this Court's rules in denial of access cases. The specific discovery Defendant's claim they are entitled to is buried in seven bullet points on page 8 and 9 of Defendant's Memorandum of Points and Authorities. The discovery sought boils down to a bald attempt to invade the Agency's investigatory and deliberative process privilege by seeking "information... by and/or within OFCCP regarding the decision to seek information beyond" the year the audit began and conduct "[d]epositions of relevant OFCCP personnel regarding the decision to expand the scope" of the audit.[15] Defendant also seeks discovery into Plaintiff's *internal consideration* of its demands for information about Plaintiff's law-enforcement decisions.[16] Notably, Google's motion makes almost no attempt to explain how the specific discovery it seeks would shed let on the relevant legal issues.

As set forth below, the discovery sought by Google is not permitted in this type of proceeding and must be denied.

## III. Argument[17]

The federal government's "authority with respect to contractors is extensive and ... it may set the terms upon which those wishing to deal with it must operate."[18] Through Executive Order 11246, Section 503 of the Rehabilitation Act, Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act, and their implementing regulations, the government has required contractors to provide specified categories of documents to Plaintiff. Among other things, contractors must provide "records pertaining to ... rates of pay or other terms of compensation ...."[19] Plaintiff's regulations repeatedly make clear, in different provisions, that Defendant must

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[15] Memorandum of Points and Authorities, Motion to Remove, p. 8.
[16] *Id.* at p. 9.
[17] Plaintiff is responding to Defendant's request to remove this matter from expedited proceedings and/or to permit discovery. These arguments are not exhaustive of Plaintiff's positions on the merits of the underlying matter; Plaintiff plans to file a motion for summary decision shortly.
[18] *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 370 (D.D.C. 1979) *appeal dismissed* 22 Empl. Prac. Dec. P 30,889 (D.C. Cir. 1980).
[19] 41 C.F.R. 60-1.12(a).

produce these documents to Plaintiff upon request.[20] In fact, Google has explicitly agreed to abide by this requirement through its individual contracts with federal agencies.[21]

Recognizing the impossibility of adequate compliance audits absent sufficient information, and the prejudice to Plaintiff caused by delays in its audits, the regulations provide for an expedited hearing before an administrative law judge when a federal contractor "has refused to give access to or supply records or other information as required by the equal employment opportunity clause."[22] This unequivocal regulatory requirement is consistent with analogous administrative subpoena[23] case law that holds that federal courts "must be cautious in granting such [broad] discovery rights, lest they transform subpoena enforcement proceedings into exhaustive inquisitions into the practices of the regulatory agencies."[24] As a district court recently explained:[25]

> A proceeding brought to enforce an administrative subpoena is summary in nature. See *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1078 (9th Cir. 2001) (describing subpoena enforcement actions as "summary procedure[s]"). This is because "the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the *rapid exercise* of the power to investigate the activities of the entities over which it has jurisdiction." *Fed. Maritime Commission v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975) (emphasis added).
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> OFCCP's regulations are consistent with this case law. As ALJ Almanza correctly held

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[20] *See, e.g.*, 41 C.F.R. § 60-2.32 (requiring contractor to "make available to the Office of Federal Contract Compliance Programs, upon request, records maintained pursuant to § 60-1.12 of this chapter"); 41 C.F.R. § 60-1.12(c)(2) (requiring contractor to "supply information [related to records above] "to the Office of Federal Contract Compliance Programs upon request"); *see also OFCCP v. Convergys Customer Mgmt. Grp., Inc.*, 15-OFC-00002, 2015 WL 7258441 (U.S. Dept. of Labor Oct. 23, 2015) (same).

[21] Complaint, p. 2, ¶ 5. *See* Pilotin Decl. at ¶ 8, Exhibit D (Defendant's admitted contract with the General Services Agency).

[22] 41 C.F.R. 60-30.31.

[23] Courts have analogized OFCCP's document requests during an audit to administrative subpoenas. *See United Space All., LLC v. Solis,* 824 F. Supp. 2d 68 (D.D.C. 2011).

[24] *S.E.C. v. Dresser Industries, Inc.,* 628 F.2d 1368, 1388 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 993 (1980).

[25] *See Solis v. Forever 21, Inc.*, Case No. CV 12-09188 (C.D. Cal., March 7, 2013) (available at https://www.dol.gov/opa/media/press/whd/WHD20130447-fs.pdf, last accessed February 1, 2017).

in *OFCCP v. U.S. Security Associates, Inc.*, where an administrative complaint alleges that a defendant has refused to supply records or other information required by the equal opportunity clause, the "proceeding falls squarely within the parameters set forth in 41 C.F.R. 60-30.31" and relief from expedited hearing procedures is unwarranted.[26] Here, Plaintiff's Complaint seeks compensation "snapshot" data for 2014 and records related to compensation snapshot data for 2014 and 2015, including contact information for employees.[27] Defendant has refused to produce these records.[28] As such, this matter falls squarely within the expedited proceedings procedures set for in the governing regulations.

a. **Defendant's proposed discovery does not relate to the relevant legal issues in this matter.**

Defendant erroneously asserts that it is entitled to discovery into Plaintiff's decision-making process in determining what information Plaintiff requested from Defendant, including preliminary findings that may have motivated the requests.[29] Such discovery is totally unrelated to the matters before this Court. The issue in this case is whether Defendant denied access to records that it was required to produce and that it agreed to produce by contract. Resolving this limited question requires only an analysis of Plaintiff's requests, Defendant's responses to those requests, and the nature of the laws and implementing regulations that define what records must be produced. There is no dispute about the contents of Plaintiff's requests, and Defendant acknowledges that it simply refused to provide certain categories of information.[30] This leaves

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[26] *OFCCP v. U.S. Security Associates, Inc.*, OALJ Case No. 2013-OFC-00002 (ALJ Feb. 15, 2013) (attached as Exhibit A).
[27] Complaint, p.4, ¶ 9.
[28] Memorandum of Points and Authorities, Motion to Remove, p. 5, ¶ 8; Duff Decl., Exhibit F.
[29] Memorandum of Points and Authorities, Motion to Remove at p. 8 (Defendant's seek "information… by and/or within OFCCP regarding the expansion of the scope of" the audit, including findings; "information… by and/or within OFCCP regarding the decision to seek information beyond" the year the audit began; "identity of OFCCP personnel involved in the decision to expand the scope" of the audit; and "[d]epositions of relevant OFCCP personnel regarding the decision to expand the scope" of the audit).
[30] Memorandum of Points and Authorities, Motion to Remove, p. 5, ¶¶ 6, 8; Duff Decl., Exhibits D, F.

only *legal* issues about the propriety of the request. The expedited procedures provide ample opportunity for the parties to address these *legal* questions regarding the Constitutionality of the request and the scope of the regulations. No discovery, let alone the discovery Defendant proposes, is necessary.

*i. Defendant has agreed by contract to produce the requested material and the proposed discovery does not relieve them of that obligation.*

Defendants are required to produce records pertaining to rates of pay or other terms of compensation because it agreed to do so by contracting with the government.[31] It is irrelevant *why* the government requested those records; as a condition of receiving tax payer funds, Defendant agreed to produce them upon request.[32] Indeed, Defendant has waived all Fourth Amendment rights with respect to documents that it has consented by contract to produce.[33] Plaintiff is entitled to all documents within the scope of the relevant regulations;[34] accordingly the only issues before the court are whether Plaintiff's requests are within the scope of the regulations.

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[31] Complaint, p. 2, ¶ 5

[32] *See U. S. Brewers Ass'n, Inc. v. Envtl. Prot. Agency*, 600 F.2d 974, 984 (D.C. Cir. 1979) (in approving additional environmental guidelines imposed by contract, the court held "[t]he Guidelines, as applied to certain federal agencies, do not attempt to impose on commercial distributors any duty to do business with the federal government; they merely require that those who choose to do business comply with certain requirements. We do not dispute that these are not requirements normally associated with the process of beverage distribution, nor that they may be to some extent onerous. Despite any burden placed on commercial operations by the Guidelines, they are incidental to voluntary participation in business relations with the federal government and accordingly are not unlawful regulation of private commercial operations").

[33] *See Zap v. U.S.*, 328 US 624, 628 (1946) *vacated on other grounds*, 330 U.S. 800 (1947) (military contractor who agreed that his "accounts and records … shall be open at all times to the Government and its representatives" could not contest the review and seizure of those records by federal agents); *see also Tri-State Steel Const., Inc. v. Occupational Safety & Health Review Comm'n*, 26 F.3d 173, 177 (D.C. Cir. 1994) *cert. denied* 510 U.S. 1015 (1995) (construction contractor working on public lands that agreed by contract to allow federal inspection could not require OSHA to get a warrant for areas covered by the contract).

[34] *See United States v. Teeven*, 745 F. Supp. 220, 236 (D. Del. 1990) (educational institution contractually bound to produce documents covered by regulations to the Department of Education); *see also Copar Pumice Co., Inc. v. Morris*, 632 F. Supp. 2d 1055, 1079–80 (D.N.M. 2008) (mining operation bound by the terms of a permit obtained from the state of New Mexico, accordingly defendant "consented to inspections conducted in compliance with the permit and the terms of the state statute").

For example, Defendant challenges Plaintiff's request for an additional year of compensation data.[35] The regulations clearly provide that "[a]ny personnel or employment record made by the contractor shall be preserved by the contractor for a period of not less than two years..." and "[w]here a compliance evaluation has been initiated, all personnel and employment records described above are relevant until OFCCP makes a final disposition of the evaluation."[36] There are no facts Defendant might discover from Plaintiff that affect whether the second year of compensation data was properly within the scope of Plaintiff's request. Defendant's proposed discovery into Plaintiff's choices in enforcement has no relevance to this question; or any other question before the Court.

ii. *Court's routinely deny the type of discovery sought by Defendant.*

Because courts treat Plaintiff's requests as analogous to administrative subpoenas,[37] the issues before this Court are limited to those governing such subpoenas: namely whether Plaintiff's requests are sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.[38] Courts have held that requests for documents by government agencies are proper when they comply with valid regulations.[39] In

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[35] Memorandum of Points and Authorities, Motion to Remove, p. 8.

[36] 41 C.F.R. 60-1.12(a)

[37] Defendant's references to *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978) are wholly inapposite. *Barlow's* addresses how the Fourth Amendment applies to an administrative agency's entry onto a business's premises. *Id.* at 314-15. There is no dispute in this case about the propriety of Plaintiff's entry into non-public areas of Defendant's business; Defendant refused to produce records requested in writing by Plaintiff at a location remote from Defendant's business. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1983) (government's request for documents to be produced at governmental offices did not involve a non-consensual entry into areas not open to the public and "[t]hus the enforceability of the administrative subpoena *duces tecum* at issue here is governed, not by our decision in *Barlow's*" but by *Oklahoma Press*).

[38] *United Space,* 824 F. Supp. 2d at 92; *Lone Steer,* 464 U.S. at 414 (reaffirming *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946)).

[39] *See United States v. Morton Salt Co.*, 338 U.S. 632, 652-653 (1950) (finding a subpoena properly limited where the request was "within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant"); *RSM, Inc. v. Buckles*, 254 F.3d 61, 69 (4th Cir. 2001) (finding an agency request for information to be sufficiently limited in scope, relevant in purpose, and specific in directive because (i) there was statutory authorization to issue

analyzing whether a request is burdensome, courts require a showing by the target of the subpoena that the request would seriously hinder normal business operations.[40] Again, the Court need only consider Plaintiff's requests with respect to the law authorizing Plaintiff's audits. Even analyzing burden requires no discovery from Plaintiff; evidence about Defendant's operations is within Defendant's control. In the context of OFCCP, a federal court has found that "[a]n order that [a contractor] produce eighteen items of individualized compensation data for a single facility" met the test for scope, relevance, specificity and lack of burden.[41] The reason Plaintiff requested specific evidence is wholly irrelevant; as the *United Space* court found, the focus of analysis for OFCCP's written requests is "on the breadth of the [request] rather than the motivation for its issuance."[42]

Moreover, in other contexts, courts consistently recognize that the targets of an administrative subpoena may not resist the subpoena by demands for information about the Agency's motivation or allegations that the Agency is simply on a "fishing expedition."[43] For

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the order; (ii) the order detailed the specific information required; and (iii) the obligation to provide information would expire once the agency was "assured ... of future compliance"); *Bank of Am. v. Solis*, 2014 WL 4661287, at *4 (D.D.C. 2014) (unreported) (requests for information pursuant to the Executive Order are authorized by statute and limited in scope as a matter of law); *Convergys*, 2015 WL 7258441 (" administrative subpoenas that both (i) seek information relevant to an agency's authorized investigation or enforcement directives, and (ii) describe the information sought in detail").

[40] *F.T.C. v. Boehringer Ingelheim Pharm., Inc.*, 898 F. Supp. 2d 171, 174 (D.D.C. 2012); *E.E.O.C. v. Bashas', Inc.*, 828 F. Supp. 2d 1056, 1071 (D. Ariz. 2011) *overruled on other grounds* 585 Fed. Appx. 325 (9th Cir. 2014).

[41] *United Space,* 824 F. Supp. 2d at 91.

[42] *Id.* at 91; *Dresser Industries, Inc.,* 628 F.2d at 1388; *see U.S. Security Associates, Inc.*, OALJ Case No. 2013-OFC-00002 (quoting *United Space* and holding that discovery into the reasons for an audit was unnecessary in the context of a denial of access case under expedited proceedings); *see also Convergys*, 2015 WL 7258441 ("while both an administrative subpoena and an administrative warrant must be properly limited in scope, an agency's procedures to decide to initiate the search are only relevant to an administrative warrant").

[43] *See Solis v. Forever 21, Inc.*, Case No. CV 12-09188 (C.D. Cal., March 7, 2013) (subject of subpoena's allegation that the government was on a "fishing expedition" was of no merit in resisting a subpoena under the Fair Labor Standards Act) (available at https://www.dol.gov/opa/media/press/whd/WHD20130447-fs.pdf, last accessed February 1, 2017).

example, in *Reich v. Montana Sulphur and Chemical Co*, the Ninth Circuit upheld a district court's refusal to order discovery into the agency's motiviations in the face of a subpoena issued by the Occupational Safety and Health Administration to probe OSHA's reasoning for issuing a subpoena.[44] Also, in *In re EEOC*, the Fifth Circuit enforced an EEOC subpoena, refusing an employer's request for discovery on an alleged improper motive for opening the investigation.[45] Similarly, the Ninth Circuit refused to permit discovery in the face of a Federal Trade Commission discovery order (akin to a subpoena) where the employer was under investigation and the employer argued that its due process rights were being violated.[46] The court found that discovery into the decision-making process of the FTC was improper, concluding "[w]e will not speculate as to the possible states of the Commissioners' minds during the pending decisional process."[47]

*iii. The Defendant's proposed discovery seeks to invade privileges and deflect attention from the relevant issues in this case.*

The discovery requested by Defendant improperly seeks information about Plaintiff's decision-making processes and enforcement techniques. Such information would be privileged, pursuant to either the Deliberative Process privilege or the Investigative Files privilege. Defendant's proposed discovery topics are focused on the decisions made by Plaintiff as to which information it requested and how those requests were tailored. Defendant is not permitted to invade the predecisional analysis undertaken by Plaintiff because it would undermine the "frank and independent discussion among those responsible for making governmental decisions..."[48] which is at the heart of an Agency's deliberative process.

This is particularly true of preliminary findings that disclose Plaintiff's process before the

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[44] *Reich v. Montana Sulphur & Chem. Co.*, 32 F.3d 440, 449 (9th Cir. 1994) (finding no error where the district court enforced an Occupational Safety and Health Administration subpoena without permitting discovery by the employer, citing *Dresser*).
[45] *Id.* at 400.
[46] *United States v. Litton Indus., Inc.*, 462 F.2d 14 (9th Cir. 1972).
[47] *Id.* at 18.
[48] *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

audit is completed. Revealing these findings would permit Defendant to game Plaintiff's system of analysis to attempt to evade enforcement. Balanced against Defendant's future opportunity to challenge findings of discrimination (if there are any), there is no reason to permit discovery of preliminary findings.[49] This information is therefore not available to Defendant.[50] Further Defendant's proposed discovery would compromise Plaintiff's approach to enforcing the law by revealing key techniques and tactics used by Plaintiff to fully examine compliance with equal employment opportunity obligations. Courts have recognized, "law enforcement operations cannot be effective if conducted in full public view"[51] and permit Agencies to protect their investigative process from discovery.

Defendant seeks discovery into the motivation of Plaintiff in conducting the audit including Plaintiff's preliminary findings and choices Plaintiff made in executing that audit. This information is wholly irrelevant to whether Defendant's complied with the law and its agreements. Rather, Defendant is attempting to deflect the inquiry into its compliance with the law by conducting intrusive discovery into Plaintiff's law enforcement function. So this Court should not order discovery requested by Defendant, either by removing this matter from expedited proceedings or permitting modifications to the expedited proceedings.

b. **No discovery is necessary to determine whether OFCCP met its conciliation obligations.**

Defendant's claim that it is entitled to discovery into Plaintiff's "consideration of [Defendant's] proposals" during conciliation[52] is novel, unsupported by precedent, and wholly frivolous. In interpreting language in Title VII nearly identical to Section 209 of the Executive

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[49] *See Philip Morris, Inc. v. Block*, 755 F.2d 368, 370 (4th Cir. 1985) (holding that OFCCP properly refused to provide the basis for a finding that good cause existed in allowing a late filing of complaint of discrimination pursuant to the deliberative process privilege where defendant "will be able to challenge this finding at a later stage in the administrative process").
[50] *Hongsermeier v. C.I.R.*, 621 F.3d 890, 904 (9th Cir. 2010).
[51] *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 542 (D.C. Cir. 1977).
[52] Memorandum of Points and Authorities, Motion to Remove, p. 9

Order,[53] the Supreme Court held that the obligation to attempt to resolve a violation by "methods of conference, conciliation, and persuasion" requires only that the EEOC "afford the employer a chance to discuss and rectify a specified [violative] practice."[54] The Agency's motives are simply not germane to the analysis. As the Ninth Circuit has recently held in *Arizona v. Geo Grp.*:[55]

> Although the EEOC, like any party to litigation, may not negotiate in good faith, these concerns were addressed by a unanimous Supreme Court in *Mach Mining*. The Court explained:
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> > Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief. For a court to assess any of those choices—as Mach Mining urges and many courts have done, is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far.

Here, there is no dispute, and Defendant seeks no discovery, into whether Plaintiff informed Defendant of Defendant's non-compliance with the law with respect to access to records. Similarly, there is no dispute, and Defendant seeks no discovery, into whether Plaintiff gave Defendant ample opportunity to discuss the matter and to come into compliance with the law.

As alleged in the Complaint, and acknowledged by Defendant's correspondence,[56] after Defendant refused to supply documents, Plaintiff spent months attempting to obtain voluntary

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[53] *Compare* 42 U.S.C. § 2000e-5 (the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion") *with* E.O. 11246 § 209 ("[t]he Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance … by methods of conference, conciliation, mediation, and persuasion…").

[54] *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1653 (2015).

[55] *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1199 (9th Cir. 2016), *cert. denied* 2017 WL 69195 (U.S. Jan. 9, 2017) (quoting *Mach Mining*, 135 S. Ct. at 1656).

[56] Duff Decl., Exhibit F.

compliance by Defendant. Compensation information was sought in the scheduling letter on September 30, 2015. The parties discussed compensation information at length, culminating in the June 1, 2016 request for complete snapshot data for 2014 and 2015 as well as employee contact information. On June 23, 2016, Plaintiff informed Defendant that withholding requested information constituted a denial of access, but that Plaintiff was committed to making every effort to take Defendant's concerns into account and engage in dialog.[57] Subsequent to this letter, Plaintiff and Defendant continued to discuss Defendant's failure to produce compensation information for six additional months. Plaintiff issued a notice to show cause in September of 2016 (despite not being required to do so), in order to make it absolutely clear that Defendant must provide the requested information and to give Defendant time to comply. After more discussions solely about this issue through November and December 2016, Defendant continued to refuse to comply with Plaintiff's request.

This Court can determine whether Plaintiff informed Defendant "about the specific allegation..." and whether Plaintiff engaged Defendant "in some form of discussion (whether written or oral)" so as to give Defendant "an opportunity to remedy" its failure to provide records without any evidence beyond the undisputed facts.[58] No discovery by Defendant regarding the conciliation process is necessary; indeed, to the extent that Defendant wishes to challenge whether Plaintiff conciliated, Defendant has access to all of the information it needs. Defendant was present at the meetings, engaged in correspondence and telephone calls with Plaintiff. Plaintiff's internal reactions to these meetings are simply not relevant.

**c. Courts recognize the validity of expedited proceedings in resolving denial of access cases.**

Because the regulations provide for expedited proceedings for denial of access cases, it is unsurprising that the Office of Administrative Law Judges typically follows those proceedings when OFCCP seeks to obtain records to which it is entitled. For example, where a contractor

[57] Duff Decl., Exhibit D.
[58] *Id.* at 1655-1656.

had raised Fourth Amendment concerns and challenged OFCCP's initiation and scope of the requests, ALJ Sarno held that, because the action was not to prove discrimination and only involved withholding documents and refusing an on-site inspection, expedited procedures without additional discovery were proper.[59] Similarly, ALJ Almanza held that, where a contractor was seeking to examine OFCCP's conduct under an incorrect Fourth Amendment standard, and where OFCCP's complaint did not allege discrimination, but rather only alleged a failure to produce documents, an expedited proceeding without additional discovery was proper.[60]

Cases cited by Defendant are not controlling or persuasive in resolving Defendant's motion. In *Boeing, Co.*,[61] Boeing's Wichita facility was scheduled for review. Boeing initially cooperated, but after producing its AAP and supporting information, it refused to provide access to records and refused to allow OFCCP to complete an *on-site* compliance review, alleging that OFCCP had improperly targeted Boeing's Wichita facilities. OFCCP admitted it had not selected the establishment for review pursuant to an administrative plan with neutral criteria or a specific complaint and Boeing produced specific facts supporting its allegation that it had been improperly targeted under the *Barlow's* standard.

The long-running *Bank of America* litigation also involved the heightened standards of *Barlow's*. Ultimately, the denial of access litigation instituted by OFCCP in *Bank of America* was a result of Bank of America's refusal to permit an on-site review after OFCCP had conducted a desk audit.[62] As Defendant's acknowledge, the issue in *Bank of America* was OFCCP's selection of the establishment for an audit, because OFCCP was seeking to non-consensual entry into non-public areas of the contractor's establishment.

Here, there is no dispute that would trigger a *Barlow's* inquiry nor has Defendant

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[59] *OFCCP v. United Space All. LLC*, OALJ No. 2011-OFC-00002 (ALJ Jan. 20, 2011), attached as Exhibit B.
[60] *U.S. Security Associates, Inc.*, OALJ Case No. 2013-OFC-00002,attached as Exhibit A.
[61] *OFCCP v. Boeing, Co.*, 99 -OFC- 14 (U.S. Dept. of Labor), 1999 WL 33992443.
[62] *Bank of Am. v. Solis*, , 2014 WL 4661287, at *2 (D.D.C. 2014) (unreported).

challenged Plaintiff's selection of Defendant's establishment for an audit. Defendant has only alleged that Plaintiff would not share pre-decisional findings with Defendant.[63] Unlike the selection of facilities and on-site entries at issue in *Boeing* and *Bank of America*, Plaintiff's internal investigative processes are irrelevant to whether Plaintiff's requests for information were valid; the Court need only determine whether those requests comply with the law.[64]

d. **Defendant's general allegations about the audit are not relevant and delay prejudices the Agency.**

Defendant attempts to distract this Court from the issue of its simple refusal to abide by its agreements and the law by raising non-issues with respect to Plaintiff's audit. As covered extensively above, Defendant attempts to paint Plaintiff's refusal to compromise the present audit or its investigatory techniques as somehow suspect. This is simply unrelated to whether Defendant must abide by its agreements and the law and provide critical compensation data to Plaintiff to permit it to complete the audit. Similarly, Defendant repeatedly references the large number of employees it has and the corresponding size of the data set produced in response to Plaintiff's requests. Again, this is not relevant to the issue before the Court. Defendant chose to do business with the government, and in so doing, agreed to keep relevant employment data and produce it upon request. There is nothing that requires Defendant to do business with the government, it chose these obligations. Moreover, Google was on notice at the time it entered its federal contracts that OFCCP's audits are conducted on an establishment by establishment basis absent an application from the contractor for a functional affirmative action program, which Google has not filed.[65] The size of the review is not driven by OFCCP but by the fact that Google has organized its workforce so that over 21,000 are at a single establishment covered by one affirmative action program.

---

[63] Memorandum of Points and Authorities, Motion to Remove, p. 11.
[64] *United Space,* 824 F. Supp. 2d at 91; *Dresser Industries, Inc.,* 628 F.2d at 1388; *U.S. Security Associates, Inc.*, OALJ Case No. 2013-OFC-00002; *Convergys*, 2015 WL 7258441.
[65] *See* 41 C.F.R. § 60-2.1(d). *See also* Directive 2013-01 at https://www.dol.gov/ofccp/regs/compliance/directives/Dir2013_01_Revision1.html.

Plaintiff is prejudiced by Defendant's continued delay and irrelevant demands. As time passes, it will become harder to gather evidence should it turn out that Defendant has engaged in discriminatory actions, lessening the likelihood that those affected will be made whole. Potential victims of discrimination are entitled to a timely remedy based on sound, rather than stale evidence. If any federal contractor scheduled for review may refuse to submit basic compensation data based only on a purely subjective belief that OFCCP acted without justification, then OFCCP's compliance reviews will be substantially undermined. OFCCP has already invested months of time and significant resources trying to resolve the parties' differences through informal means. The very reason expedited procedures are available in circumstances such as these is because "the ends of justice" are not served by allowing a contractor to drag its feet, turning a month delay here and there into sufficient time for memories to fade and information to be lost. If Defendant's mere subjective belief of Plaintiff's flawed decision-making process is enough to remove the case from expedited hearing procedures, then any federal contractor in any denial of access case may remove the case from expedited hearing procedures.

Defendant would like nothing better than to bog these proceedings down in discussions about Plaintiff's investigative process or its partial cooperation. When the case is properly framed, the issue for resolution is easily addressed by the parties without further delay and distraction: whether Defendant refused to provide records and information it was required to provide by its own agreements and the law.

## IV. Conclusion

Plaintiff's Complaint presents a narrow issue for this Court to resolve: did Defendant comply with the Executive Order and its implementing regulations and its own contractual agreement to produce records? Plaintiff's motivation and tactics in seeking records, and the preliminary findings reached before Plaintiff's audit is complete are wholly irrelevant to this inquiry. Accordingly, the issue is properly resolved under the expedited procedures provided for at 41 C.F.R. 60-30.31 without additional discovery. The Court should deny Defendant's Motion.

Date: February 3, 2017

Respectfully submitted,

KATHERINE E. BISSELL
Deputy Solicitor for Regional Enforcement

JANET M. HEROLD
Regional Solicitor

IAN ELIASOPH
Counsel for Civil Rights

JEREMIAH MILLER
Senior Trial Attorney

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E-Mail: miller.jeremiah@dol.gov

## CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103. On February 3, 2017, I served the within

1. **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REMOVE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

2. **EXHIBITS A AND B TO RESPONSE TO MOTION TO REMOVE**

3. **DECLARATION OF AGNES HUANG IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO REMQ.VE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

4. **DECLARATION OF MARC PILOTIN IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO REMOVE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

5. **EXHIBITS A THROUGH D TO PILOTIN DECLARATION**

on the Defendant in this action via email addressed to:

Duff, Daniel V., III (Long Island) <Daniel.Duff@jacksonlewis.com>;
Camardella, Matthew J. (Long Island) <CamardeM@jacksonlewis.com>;
Sween, Lisa Barnett (San Francisco) <Lisa.Sween@jacksonlewis.com>
Suits, Eric E. (Sacramento) <Eric.Suits@Jacksonlewis.com>

Executed: February 3, 2017

/s/*Llewlyn D. Robinson*
LLEWLYN D. ROBINSON
Paralegal Specialist

OFFICE OF THE SOLICITOR
UNITED STATES DEPARTMENT OF LABOR

Exhibit A
*OFCCP v. Google, Inc.*

**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

**Issue Date: 15 February 2013**

OALJ Case No.: 2013-OFC-00002

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

U.S. SECURITY ASSOCIATES, INC.,
Defendant.

## ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO TAKE DEPOSITIONS AND FOR RELIEF FROM EXPEDITED HEARING PROCEDURES

On January 15, 2013, Counsel for the Office of Federal Contract Compliance Programs, United States Department of Labor ("OFCCP" or "Plaintiff") filed an Administrative Complaint against U.S. Security Alliance ("USSA" or "Defendant"). The action brought by OFCCP is to enforce the contractual obligations imposed by Executive Order ("EO") 11246, as amended by EOs 11375, 12086, and 13279; section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, as amended; section 4212 of the Vietnam Era Veteran's Readjustment Assistance Act, 38 U.S.C. § 4212, as amended; and the regulations issued pursuant to those authorities at 41 C.F.R. Chapter 60. Administrative Complaint, ¶ 1.

Plaintiff alleges that Defendant failed to submit its affirmative action plan ("AAP") and supporting data in response to a Scheduling Letter sent in January 2012 and continued to fail to provide this information despite Plaintiff's follow-up requests. Administrative Complaint. ¶¶ 8-11. Plaintiff also requests that expedited procedures pursuant to 41 C.F.R. §§ 60-30.31 through 60-30.37 be used in this case. Administrative Complaint, ¶ 16.

On January 31, 2013, Defendant timely filed its Answer to OFCCP's Administrative Complaint ("Answer"). In its Answer, at ¶ 28, Defendant "admits that it refused to comply with OFCCP's request for its affirmative action plan ["AAP"] and supporting data," and, at ¶ 29, "admits that OFCCP made follow-up requests for USSA's AAP after OFCCP issued the Scheduling Letter, and that USSA did not provide any of the documents or information requested...." At ¶ 38 of its Answer, Defendant requested a hearing in this matter.

On February 4, 2013, Defendant filed a motion for leave to take depositions and for relief from expedited hearing procedures, and Plaintiff timely filed an opposition to this motion on February 13, 2013. On February 13, 2013, a telephone conference call was held with counsel for the parties to discuss this motion. (With no objection from counsel, one conference call was held to discuss this motion and the substantively identical motion at issue in 2013-OFC-00003. I noted during the conference call that, as yet, these matters are not consolidated.)

41 C.F.R. § 60-30.31 states, in relevant part, that:

> Expedited Hearings may be used, *inter alia*, when a contractor or subcontractor ... has refused to give access to or to supply records or other information as required by the equal opportunity clause...."

Defendant objects to an expedited hearing and seeks depositions on the grounds that without depositions, it will be denied its due process rights and will be unable to defend itself by showing that OFCCP violated its Fourth Amendment rights by improperly selecting it for audit. Defendant's Memorandum of Points and Authorities in Support of Its Motion for Leave to Take Depositions and For Relief from Expedited Hearing Procedures ("Defendant's Memorandum"), at 10-11, 21-22. Defendant's argument is predicated on its belief that OFCCP must meet the standard for administrative warrants set forth in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) in selecting USSA for audit. *See* Defendant's Memorandum, at 12. In support of its position, Defendant argues that Plaintiff's audit process, with very few exceptions, causes each request for documents as part of a desk audit ultimately to result in an on-site inspection unless the contractor at issue provides additional compensation information to OFCCP. *Id.* at 13-20.

Plaintiff responds that *Barlow's* does not apply here, and instead, as explained in *United Space Alliance, LLC v. Solis*, 824 F.Supp.2d 68 (D.D.C. 2011), the relevant standard is that applicable to administrative subpoenas set forth in *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984). Plaintiff's Brief in Opposition to Defendant's Motion for Leave to Take Depositions and for Relief from Expedited Procedures ("Plaintiff's Brief"), at 6-9. Moreover, Plaintiff responds that the rights afforded contractors in expedited proceedings provide Defendant due process. Plaintiff's Brief, at 5.

The issue before the District Court in *United Space Alliance* involved a contractor's refusal to comply with a request for data. *United Space Alliance*, 824 F. Supp.2d at 79. The District Court analyzed the issue of whether *Barlow's* or *Lone Steer* should provide the standard for whether an OFCCP request for information complies with the requirements of the Fourth Amendment, and concluded that "[t]he order under review here does not authorize entry onto private areas of United Space property, and so it is properly tested under *Lone Steer*." *Id.* at 92. The District Court described the *Lone Steer* standard as follows:

> [W]hen an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. T[he] ... cases hold[] administrative subpoenas to a considerably lower standard than administrative warrants – a standard that notably

> focuses on the breadth of the subpoena rather than the motivation for its issuance."

*Id.* at 91 (internal marks and citations omitted). The District Court then went on to distinguish *Beverly Enterprises v. Herman*, 130 F.Supp.2d 1 (D.D.C. 2000), cited for the proposition that the *Barlow's* standard applies to "similar orders," on the grounds that in *Beverly*, the order did not just apply to documents, but to an inspection of the contractor's "files and headquarters" and thus *Barlow's* supplied the proper standard. *United Space Alliance*, 824 F. Supp. 2d at 93.

Pursuant to the District Court's holding in *United Space Alliance*, the applicable Fourth Amendment standard here is provided by *Lone Steer*. As a result, Defendant's arguments for relief from expedited procedures and for leave to take depositions fail as they are premised on the *Barlow's* standard. *United Space Alliance* also makes clear that expedited procedures "satisfy the requirements of due process." *Id.* at 96 (citing *Beverly*, 130 F. Supp. 2d at 18-20).

The Administrative Complaint alleges neither that Defendant has violated any requirements with respect to its affirmative action program, nor that Defendant has refused to permit Plaintiff to conduct an on-site inspection. Rather, the Administrative Complaint simply alleges that the Defendant has refused to supply records or other information as required by the equal opportunity clause. I conclude that this proceeding falls squarely within the parameters set forth in 41 C.F.R. §60-30.31. Therefore, Defendant's motion for relief from expedited hearing procedures is DENIED.

Defendant's request for depositions seeks information as to the reasons Plaintiff selected it for audit. Defendant's Memorandum, at 10-11. I conclude that depositions seeking this information are unnecessary as *Lone Steer* provides the Fourth Amendment standard applicable here. Accordingly, Defendant's motion for leave to take depositions is DENIED.

Defendant's request for a hearing is GRANTED. Information from the parties is currently pending concerning a suitable location for the hearing of this case and the approximate number of days required. Pursuant to 41 C.F.R. § 60-30.32(d), the hearing must be convened no later than March 18, 2013. Accordingly, the parties shall confer and submit proposed hearing dates no later than February 25, 2013, the date the currently pending information is due.

**SO ORDERED.**

Digitally signed by PAUL R. ALMANZA
DN: CN=PAUL R. ALMANZA, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

## SERVICE SHEET

Case Name: **OFCCP_-_CHICAGO_IL_v_US_SECURITY_ASSOC_IN_**

Case Number: **2013OFC00002**

Document Title: **Order Denying Defendant's Motion for Leave to Take Depositions etc**

I hereby certify that a copy of the above-referenced document was sent to the following this 15th day of February, 2013:

Digitally signed by SHEILA SMITH
DN: CN=SHEILA SMITH, OU=LEGAL ASSISTANT, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

**SHEILA SMITH**
LEGAL ASSISTANT

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Office of Federal Contract Compliance Programs
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Exhibit B
*OFCCP v. Google, Inc.*

**U.S. Department of Labor**

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

**Issue Date: 20 January 2011**

Case No.: 2011-OFC-00002

**IN THE MATTER OF:**

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,
v.
UNITED SPACE ALLIANCE, LLC,
Defendant.

## PRE-HEARING ORDER # 3

On November 10, 2010, Counsel for the Office of Federal Contract Compliance Programs, United States Labor (OFCCP or Plaintiff) filed an Administrative Complaint against United Space Alliance, LLC (USA or Defendant). The action brought by OFCCP is to enforce the contractual obligations imposed by Executive Order 11246 (30 Fed. Reg. 12319), as amended by Executive Order 11375 (32 Fed. Reg. 14303), Executive Order 12086 (43 Fed. Reg. 46501), and Executive Order 13279 (67 Fed. Reg. 77141)("Executive Order"); section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 ("Rehabilitation Act"); section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212 ("VEVRAA"), as amended; and the regulations issued pursuant thereto.

Plaintiff seeks an expedited hearing pursuant to 41 C.F.R. § 60-30.31 because Plaintiff alleges Defendant has refused to give access to or supply records and information and has refused to allow an on-site compliance review to be conducted.

Defendant timely filed its answer within 20 days of complaint being filed. In its answer, Defendant denied that it had: 1) refused to give access to or supply records and information; and 2) refused to allow an on-site compliance review to be conducted.

Defendant objects to an expedited hearing and moves to have the complaint removed from the expedited hearing procedures. In its memorandum, Defendant suggests that it was justified in refusing to comply with Plaintiff's information request and Plaintiff's request for an on-site compliance review. Defendant offers several reasons to justify its actions[1] and also submits that Plaintiff's actions constitute an unreasonable search in violation of the Fourth Amendment as well as violations of equal protection and due process under the Fifth

[1] Defendant points to correspondence between Defendant and Plaintiff from 2002 until 2010. A prior audit was conducted from 2002-2006. The current audit began in 2007. During that time, Defendant believes that Plaintiff unfairly targeted Defendant and changed the analyses from the prior audit.

Amendment. [2] Finally, Defendant maintains that removing this proceeding from the expedited hearing procedures will allow Defendant to obtain discovery necessary to establish its defenses to Plaintiff's allegations.

41 C.F.R. § 60-30.31 states in pertinent part:

Expedited Hearings may be used, inter alia, when a contractor or subcontractor...has refused to give access to or to supply records or other information as required by the equal opportunity clause; or has refused to allow an on-site compliance review to be conducted.

The instant proceeding is an enforcement proceeding. Defendant has not been charged with any violations with regard to its affirmative action program. Defendant is charged with refusing to give access to or to supply records or other information as required by the equal opportunity clause and/or refusing to allow an on-site compliance review to be conducted. This proceeding is simply to determine whether OFCCP has established sufficient evidence to justify the request for additional information and/or an on-site review.[3] I conclude that this proceeding falls squarely within the parameters set forth in 41 C.F.R. § 60-30.31. Therefore, Plaintiff's motion for an expedited hearing IS GRANTED. Since the issues in this proceeding are limited in scope, I see no need for permitting extensive discovery.

A Settlement Judge was appointed on December 2, 2010. The parties filed a joint status report on January 19, 2011, informing the Presiding Judge that the settlement negotiations were unsuccessful. Since the settlement negotiations took several weeks, the Presiding Judge is unable to adhere to the hearing date previously mentioned in Pre-hearing Order #1. I direct the parties to immediately confer and agree upon a hearing situs and dates for a hearing to be held prior to Thursday, February 17, 2011. The agreed upon hearing situs and dates will be relayed to the Presiding Judge no later than Monday, January 24, 2011. Should the parties fail to notify the Judge of their agreement by that date, the hearing in this matter will commence at 9:00 a. m. on Wednesday, February 15, 2011 in Courtroom #1 in Newport News, Virginia at the following location:

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
11870 Merchant's Walk, Suite 204
Newport News, VA 23606

**SO ORDERED.**

Daniel A. Sarno, Jr.
DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/ccb
Newport News, Virginia

[2] It seems that Defendant has also refused to comply until either Plaintiff provided answers to various questions presented to Plaintiff by Defendant or Plaintiff accepts one of three proposals presented to Plaintiff by Defendant.
[3] Defendant does not question the statutory authority OFCCP to make such requests. Rather, Defendant questions whether such requests were properly initiated and reasonably limited in scope.

**SERVICE SHEET**

Case Name: **OFCCP_-_ATLANTA_GA_v_UNITED_SPACE_ALLIANC_**

Case Number: **2011OFC00002**

Document Title: **Pre-hearing Order #3**

I hereby certify that a copy of the above-referenced document was sent to the following this 20th day of January, 2011:

Cathy C. Barefoot

**CATHARINE C .BAREFOOT**
**PARALEGAL SPECIALIST**

404/302-5438

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Chief Financial Officer
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Office of Federal Contract Compliance Programs
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United Space Alliance, LLC
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202/739-3001

William E Doyle, Jr.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
*{Hard Copy-Regular Mail and Fax}*

## CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103. On February 3, 2017, I served the within

1. **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REMOVE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

2. **EXHIBITS A AND B TO RESPONSE TO MOTION TO REMOVE**

3. **DECLARATION OF AGNES HUANG IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO REMQ.VE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

4. **DECLARATION OF MARC PILOTIN IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO REMOVE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

5. **EXHIBITS A THROUGH D TO PILOTIN DECLARATION**

on the Defendant in this action via email addressed to:

Duff, Daniel V., III (Long Island) <Daniel.Duff@jacksonlewis.com>;
Camardella, Matthew J. (Long Island) <CamardeM@jacksonlewis.com>;
Sween, Lisa Barnett (San Francisco) <Lisa.Sween@jacksonlewis.com>
Suits, Eric E. (Sacramento) <Eric.Suits@Jacksonlewis.com>

Executed: February 3, 2017

/s/*Llewlyn D. Robinson*
LLEWLYN D. ROBINSON
Paralegal Specialist

OFFICE OF THE SOLICITOR
UNITED STATES DEPARTMENT OF LABOR

**UNITED STATES DEPARTMENT OF LABOR**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

**Case No.: 2017-OFC-00004**



**DECLARATION OF AGNES HUANG IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO REMOVE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

I, AGNES HUANG, make this declaration, under the penalty of perjury.

1. I am employed as an Assistant District Director by the United States Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") an Agency of the United States government, with its business address at 1640 S. Sepulveda Blvd, Suite 440, Los Angeles, CA 90025. In that capacity, I am assigned to oversee investigations conducted by the OFCCP as directed, involving the enforcement of the Executive Order 11246, as amended, Section 503 of the Rehabilitation Act and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act. Since February 24, 2016, I have been assigned to assist and supervise the investigation of Google, Inc.

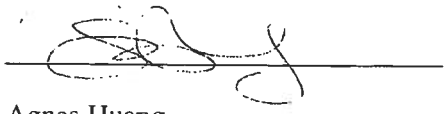
2. I possess personal knowledge of the matters set forth in this declaration. I am competent to testify to the same, and if called to testify my testimony would be as stated in this declaration.

3. The Office of Federal Contract Compliance Programs ("OFCCP") sent Google, Inc. a scheduling letter on September 30, 2015, seeking (among other things) compensation data. Between September 30, 2015 and April 27, 2016, Google provided some compensation data, including compensation database with September 1, 2015 snapshot. However, Google resisted producing many categories of information over that time period, including value of stock award at the time of award and employee names.

4. On June 1, 2016, OFCCP requested 2014 compensation snapshot data, job and salary history, employee contact information, and various other categories of compensation and hiring data. On June 14, 2016, Google and OFCCP conferred regarding the scope of the June 1, 2016 request. I was at that conference. Google objected to the scope, burden, and relevancy of the request and demanded that OFCCP reveal details of its ongoing investigation. OFCCP declined to do so, and renewed its request for all data requested on June 1, 2016.

5. On June 17, 2016, Google responded, refusing to provide requested information. OFCCP responded on June 23, 2016, informing Google that its refusals were a denial of access and contrary to law. Google and OFCCP continued to discuss the matter after June 23, 2016; including by teleconference on July 18, 2016. I attended that teleconference. Google and OFCCP discussed the agency's June 1, 2016 request and Google continued to object based on burden, scope and relevancy. Google agreed to provide certain items by August 1, 2016, but objected to the remaining items. Google asserted that it would consider providing the data if OFCCP limited the request to a subset of employees and/or reveal the specific reason why the data is necessary to determine compliance. OFCCP did not agree with Google's position. OFCCP asserted that all data requested is necessary and relevant to determining Google's compliance. Subsequent to the July 18, 2016 meeting, OFCCP sent a list of outstanding items to Google and asked Google to confirm whether it intends to provide them to the agency.

I swear under penalty of perjury that the foregoing is true to the best of my knowledge and that this document was executed on this 7 day of February, 2017 in Los Angeles, California.



Agnes Huang
Assistant District Director,
OFCCP
United States Department of Labor

**UNITED STATES DEPARTMENT OF LABOR**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**

| | |
|---|---|
| OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,<br><br>Plaintiff,<br><br>v.<br><br>GOOGLE, INC.,<br><br>Defendant. | **Case No.: 2017-OFC-00004** |



**DECLARATION OF MARC PILOTIN IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO REMOVE THE ADMINISTRATIVE COMPLAINT FROM EXPEDITED PROCEDURES OR PERMIT DISCOVERY**

I, MARC PILOTIN, make this declaration, under the penalty of perjury.

1. I am employed as a Trial Attorney by the United States Department of Labor, Office of the Solicitor an Agency of the United States government, with its business address at 90 Seventh Street, Suite 3-700, San Francisco, CA 94103. In that capacity, I am assigned to represent the Office of Federal Contract Compliance Programs, United States Department of Labor, in matters involving the enforcement of the Executive Order 11246, as amended, Section 503 of the Rehabilitation Act and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act.

2. I possess personal knowledge of the matters set forth in this declaration. I am competent to testify to the same, and if called to testify my testimony would be as stated in this declaration.

3. On September 16, 2016, OFCCP issued a notice to show cause why proceedings should not be initiated against Google for denying access to records. A true and correct copy of that notice is attached to this declaration as Exhibit A.

4. By correspondence on October 19, 2016, Google stated that the parties were at an impasse with OFCCP regarding its obligations to turn over compensation data requested by OFCCP on June 1, 2016. A true and correct copy of that letter is attached to this declaration as Exhibit B.

5. On November 29, 2016, Google and OFCCP held a teleconference about Google's continued refusal to provide the requested compensation data. I attended that teleconference. During that teleconference, the parties discussed OFCCP's requests and were able to resolve certain of Google's objections to those requests. However, the parties were not able to resolve Google's objections related to the items requested in this expedited proceeding.

6. By correspondence on December 6, 2016, Google acknowledged that OFCCP made clear it believed it was entitled to the requested compensation data. A true and correct copy of that letter is attached to this declaration as Exhibit C.

7. On December 20, 2016, I sent a letter to Google, informing it that OFCCP planned to commence enforcement actions for denial of access to records. I invited Google to make an offer of settlement to resolve the matter short of litigation. On December 23, 2016, I and Ian Eliasoph, Counsel for Civil Rights, had a further teleconference with counsel for Google regarding OFCCP's requests in an attempt to resolve Google's objections. However, by a letter on December 28, 2016, Google confirmed its objections, refusing to provide the items requested in this expedited proceeding.

8. Google is subject to a contract, effective June 2, 2014, with the General Services Administration for more than $50,000. This contract includes an obligation to be bound by FAR 52.222-26, which in turn includes equal opportunity clauses and agreements to provide access to records as described in OFCCP's regulations. The full contract consists of (1) the Government's solicitation; (2) Google's offer, dated July 2, 2013; (3) Google's Final Proposal Revision, dated

April 23, 2014 and submitted May 6, 2014; and (4) the relevant Standard Form 1449 and its continuing pages. True and correct copies of the relevant portions of the contract documents are attached to this declaration as Exhibits D-1, D-2, and D-3.

I swear under penalty of perjury that the foregoing is true to the best of my knowledge and that this document was executed on this 3d day of February, 2017 in San Francisco, California.

MARC PILOTIN
Trial Attorney,
Office of the Solicitor
United States Department of Labor

Pilotin Decl., Exhibit A
*OFCCP v. Google, Inc.*

U.S. Department of Labor

Office of Federal Contract Compliance Programs
Pacific Regional Office
90 Seventh Street, Suite 18-300
San Francisco, CA 94103

September 16, 2016

**VIA CERTIFIED MAIL (#70150640000170622609)**
**RETURN RECEIPT REQUESTED AND**
**ELECTRONIC MAIL**

Sundar Pichai
Chief Executive Officer
Google, Inc.
1600 Amphitheatre Parkway
Mountain View, California 94043

**RE: EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE EVALUATION OF GOOGLE, OFCCP NO.: R00197955**

Dear Mr. Pichai:

The United States Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), is conducting a compliance evaluation of Google, Inc. ("GOOGLE") located at 1600 Amphitheatre Parkway, Mountain View, California 94043, pursuant to the following authorities: 41 Code of Federal Regulations ("C.F.R.") Chapter 60: Executive Order 11246, as amended ("E.O. 11246"); Section 503 of the Rehabilitation Act of 1973, as amended ("Section 503"); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended ("38 U.S.C. 4212").

In the Agency's June 1, 2016 and June 23, 2016 correspondence, as well as in subsequent telephone and email communications on August 25, 2016, OFCCP requested that GOOGLE submit employment records relevant to the compliance evaluation, as described at 41 C.F.R. 60-1.12 and 60-1.43. Specifically, the Agency requested employee contact information, and employment records pertaining to hiring, compensation and other practices, which federal contractors must maintain and submit to OFCCP in a timely manner during a compliance evaluation under E.O. 11246 and related authorities.

For your records, enclosed is an itemized listing of OFCCP's outstanding information requests (Attachment C). A copy of the correspondence between OFCCP and GOOGLE's representatives in which GOOGLE denies the Agency access to relevant employment records on June 17, 2016, June 30, 2016, and September 2, 2016 is also enclosed (Attachment B).

Because of GOOGLE's noncompliance during the compliance evaluation, OFCCP is issuing this Notice to Show Cause why enforcement proceedings should not be initiated against GOOGLE, pursuant to Sections 208 and 209 of E.O. 11246, and 41 C.F.R. 60-1.26 and 60-1.28.

GOOGLE is required to provide OFCCP with access to the requested information so that the Agency can conduct a compliance evaluation of your facility, within 30 calendar days of your receipt of this Notice, or OFCCP shall recommend that enforcement proceedings be initiated in accordance with the above authorities. In the proceedings, GOOGLE will have an opportunity to request a hearing before sanctions are imposed.

Allowing OFCCP access to the requested information in order to conduct the compliance evaluation does not preclude the identification of further violations. Further violations may be based upon a finding during the desk audit or subsequent onsite review that either your AAPs do not meet the requirements of 41 C.F.R. 60-2, 60-741 and 60-250, or your establishment is not in compliance or has failed to comply in the past with the requirements of E.O. 11246, Section 503, 38 U.S.C. 4212, and their implementing regulations. OFCCP will not withdraw this Notice to Show Cause until all deficiencies cited in this Notice (or subsequently identified in an Amended Show Cause Notice incorporating any additional violations found during the desk audit or onsite review) have been fully and satisfactorily resolved in a written Conciliation Agreement.

OFCCP would prefer to avoid enforcement proceedings. You may contact Agnes Huang, Assistant District Director, at (310) 268-1467 within five business days of receipt of this Notice if GOOGLE would also prefer to conciliate a resolution of this violation.

Sincerely,

Janette Wipper
Regional Director

Enclosures: Attachment A – Violation
Attachment B – OFCCP and GOOGLE Correspondence
Attachment C – Itemized Listing of Pending Information Request

cc: Matthew Camardella, Jackson Lewis P.C. (camardem@jacksonlewis.com)
Daniel Duff, Attorney, Jackson Lewis P.C. (daniel.duff@jacksonlewis.com)
Scott Williamson, Integrity Program Manager, GOOGLE
(scwilliamson@google.com)

Attachment A

**VIOLATION**: GOOGLE failed to submit requested records relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations in violation of 41 CFR 60-1.43 and 60-1.20.

**CORRECTIVE ACTION**: GOOGLE must allow OFCCP access to its records and provide any and all information requested by OFCCP that has not been previously submitted.

Attachment B

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
Los Angeles District Office
[illegible] Sepulveda Blvd., Suite [illegible]
Los Angeles, CA 90025

**VIA EMAIL**

June 1, 2016

Mr. Daniel Duff
Attorney At Law
Jackson Lewis P.C.
58 S. Service Road, Suite 250
Melville, NY 11747

Re: Google Corporation - Mountain View, California

Dear Mr. Duff:

Thank you for the opportunity to gain further insight into Google's personnel practices. As we continue with the compliance review process additional data will be requested as necessary.

At this time, we are requesting the addition of specific data factors to the existing compensation database, as well as copies of specific documents and records. Please find our request detailed in the attachment below.

This data must be provided to the agency by June 22, 2016. If there are any questions, please contact us. Thank you.

Agnes Huang
Assistant District Director

cc: Scott Williamson, Integrity Program Manager (scwilliamson@google.com)

Attachment C

## COMPENSATION FACTORS NOT PROVIDED

1. Compensation Database (9/1/2014 snapshot)
2. Competing Offer
3. Employee Education
4. Employee Name
5. Equity Adjustment
6. Job History
7. Job Function
8. Long-term/short-term incentive eligibility grants
9. National Origin/ Citizenship/ Visa Status/ Place of Birth
10. Prior Experience
11. Prior Salary
12. Salary History
13. Starting Compa Ratio
14. Starting Job Code
15. Starting Job Family
16. Starting Job Function
17. Starting Level
18. Starting Organization
19. Starting Position/Title
20. Starting Salary
21. Stock Monetary Value (at award date)
22. Any other factors related to compensation
23. Any other job classifications/categories maintained

## HIRING INFORMATION NOT PROVIDED

1. All expressions of interest
2. Applicant interview notes (job groups: 211-216)
3. Applicant profile
4. Department applied to
5. Department hired into
6. Education
7. Prior work experience
8. Resumes
9. Any other employee characteristics maintained
10. Applicant flow data: multiple thousands of applicants are not identified by race and gender. Please provide race and gender data for all applicants and all expressions of interest.

## OTHER DOCUMENTS NOT PROVIDED

1. Internal employee complaints or concerns about any unfair treatment raised within the last three years (name, race, gender, national origin, job title, manager, department, organization, basis and status)
2. Market, salary or industry surveys
3. Employee contact information
4. Public access files and LCA's (9/1/13-8/31/15)
5. Automated resume screen system

**INCOMPLETE SUBMISSION**

1. Organizational Charts - All Organizational charts by department
2. Equity Policy, including all Stock Agreements